No. 83715-5

SUPREME COURT OF THE STATE OF WASHINGTON

MAUREEN T. BLAIR and KENNETH E. BLAIR,

Appellants,

v.

TA - SEATTLE EAST #176,
d/b/a TRAVELCENTERS OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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1. Was the Court of Appeals correct in holding that the record "provides adequate grounds to evaluate the trial court's decision in imposing discovery sanctions," and in affirming the trial court's October 15, 2007 Order, CP 216-17, which struck two undeposed health care providers from a list of trial witnesses that the Blairs served on October 2, 2007, twenty days before trial and four weeks after the discovery cutoff date, where:

-- the Blairs had failed to comply during discovery with both of two separate witness-disclosure deadlines set by local court rules and a Case Schedule Order, and served a bare list of names of 15 possible witnesses, none of whom were health care providers or experts, nine days late;

-- the Blairs, in response to defendant TravelCenters' motion to strike their late-filed list of 15 possible witnesses, argued to the trial court that a lesser sanction was required under *Burnet v. Spokane Ambulance*, but did not make any request for an extension of time or permission to add any expert or health care provider witnesses;

-- the trial court by Order of August 14, 2007, declined to strike the Blairs' entire witness list and instead limited them to seven witnesses of their choosing and gave them until August 17 to serve such a list;

-- the Blairs first sought permission to add other witnesses to their list by motion for "clarification" filed September 13, 2007, after the discovery cutoff deadline of September 4 set by the Case Schedule Order, but did not represent that any additional witnesses they proposed to add would be called as experts or to express medical opinions, or that they were available for deposition before trial;

-- the trial court denied the Blairs' motion for "clarification" by Order entered September 21, to which the Blairs did not assign error on appeal below;

-- the Blairs defied the September 21 Order and King County Superior Court Local Rule 26(b)(4) by serving on October 2, twenty days before the scheduled trial, a list of trial witnesses that included the names of (but no summary of any opinions held by) two undeposed health care providers, Dr. Owen Higgs and Keith Drury, P.T.;

-- the Blairs, in their Opposition to TravelCenters' motion to strike Dr. Higgs and Mr. Drury, again argued that a lesser sanction was required under *Burnet v. Spokane Ambulance*, and the trial court entered an Order granting TravelCenters' motion and expressly stating that it had considered the Blairs' Opposition; and

-- the Blairs assigned error on appeal to the August 14 and October 15 Orders but not to the September 21 Order?

2. Did the trial court correctly dismiss the Blairs' slip-and-fall lawsuit because they lacked admissible expert medical opinion testimony without which they cannot support their allegation that Mrs. Blair needed hip replacement surgery in 2005 at age 56 because she had fallen at TravelCenters' truck stop in 2003?

II. RESPONDENT'S STATEMENT OF THE CASE

This was a slip-and-fall case, subject to King County Superior Court local rules and a Case Schedule Order, CP 367-71. The trial court dismissed on summary judgment because the Blairs lacked expert medical opinion testimony to prove that Mrs. Blair probably needed a 2005 hip replacement because she had fallen at TravelCenters' truck stop in 2003. CP 307-09. The Blairs argued on appeal that the trial court abused its discretion by entering an October 15, 2007 Order striking two health care providers whom the Blairs disclosed as trial witnesses 20 days before trial without making findings that the Blairs contend are required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 132 P.3d 115 (2006), CP 216-17, and then erred by summarily dismissing the Blairs' lawsuit because the October 15 Order left them without the medical opinion testimony necessary to prove their claim.

The October 15 2007 Order striking the two late-disclosed health care provider witnesses was not the first order in the lawsuit relating to the

disclosure of witnesses by the Blairs. That Order enforced two prior orders concerning disclosure of witnesses, which in turn had enforced a Case Schedule Order setting deadlines for each side to disclose possible trial witnesses, neither of which the Blairs complied with.

The first prior witness-disclosure Order, CP 216-17, was entered on August 14, 2007, after the Blairs failed to meet either of the two Case Schedule Order deadlines (May 21 and July 2, 2007) for disclosing possible trial witnesses.[1] The Blairs served, nine days late, a list of 15 possible witnesses, none of whom were experts or health care providers. CP 429-34. TravelCenters moved to strike the whole list. CP 17-25. The Blairs invoked *Burnet* and asked for a less severe sanction, CP 122-23, but did not ask permission to list witnesses who had not been on their July 11 list or any health care or medical expert witnesses. The trial court's August 14 Order chose a lesser sanction than the one TravelCenters requested, by limiting the Blairs to seven of their witnesses. CP 216-17. The Blairs served a revised list of seven witnesses. CP 440-44.

Two weeks later, the September 4 discovery cutoff date passed. On September 13, the Blairs filed two motions concerning witnesses. One

[1] Before the second of the deadlines for disclosing possible trial witnesses, the Blairs moved for a continuance of the trial date, citing turmoil in their counsel's officing situation and a busy trial schedule, but not a need for more time to identify and disclose possible witnesses. CP 108-116. The trial court denied the motion to continue the trial date. CP 15-16. The Blairs did not assign error to that ruling on appeal.

sought permission to add an eighth non-expert witness. CP 218-25. The trial court denied it by order, CP 254-55, to which the Blairs did not assign error on appeal. The Blairs' other post-discovery-cutoff motion sought "clarification" of the August 14 Order limiting them to seven witnesses. CP 226-36. The Blairs asked the trial court to allow them to call as trial witnesses anyone whom TravelCenters had listed as a possible witness back in May 2007, in addition to the seven people they had disclosed in August,[2] mentioning by name but offering no specific argument concerning four persons (Dr. Owen Higgs, Dr. Robert Colburn, Chris Puckett, and Keith Drury, PT, CP 226). The Blairs but did not specify which persons, if any, they proposed to have offer expert opinion testimony as to any particular medical issue, offered no summary of any expected opinion testimony, and did not represent that anyone they proposed to add was available for deposition before trial.

KCLR 26(b)(4) prohibits calling witnesses at trial who have not been disclosed during discovery as required by KCLR 26(b)(3).[3] Because the Blairs had disclosed no health care providers or experts as possible

[2] TravelCenters' May 2007 list had included, as possible *non*-expert witnesses, all 35 individuals believed to have been Mrs. Blair's health care providers. CP 419-26.

[3] King County Local Rule 26(b)(4) provides that "[a]ny person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires."

trial witnesses for *them*, TravelCenters had not deposed any such persons during discovery.[4]

The trial court denied the Blairs' motion for "clarification" by Order entered September 21, 2007. CP 256-57. On appeal, the Blairs did not assign error to that ruling.

On October 2, 2007, with trial scheduled to begin on October 22, the Blairs served a list of trial witnesses, including Dr. Higgs and Keith Drury, an Idaho physical therapist (but not Dr. Coburn or Chris Puckett). CP 266-67. The Blairs did not indicate that either Dr. Higgs or Mr. Drury would be called to give opinion testimony. The Blairs did not make an offer of proof as to the testimony that either Dr. Higgs or Mr. Drury would give, and never represented that Mr. Drury was willing to travel from Idaho to Seattle for trial.

The trial court granted TravelCenters' motion to strike Dr. Higgs and Mr. Drury from the Blairs' list of trial witnesses. CP 277-79. That set the stage for dismissal of the Blairs' lawsuit for lack of expert testimony

[4] Nor had TravelCenters interviewed any of Mrs. Blair's health care providers "ex parte," because of the prohibition against such contact imposed by *Loudon v. Mhyre*, 110 Wn.2d 675, 678, 756 P.2d 138 (1988).

without which they cannot establish that the May 2003 fall was a proximate cause of the hip replacement that Mrs. Blair had in 2005.[5]

The Court of Appeals affirmed the trial court. *Blair v. TA-Seattle East #176,* 150 Wn. App. 904, 210 P.3d 1026 (2009). The Court of Appeals subsequently denied the Blairs' motion for reconsideration, in which the Blairs argued that an unsworn medical evaluation, CP 342, conducted by an Idaho physician, Dr. R.C. Colburn, for Mrs. Blair's Idaho employer's workers compensation insurance adjuster, (*see* CP 149),[6] constituted sufficient evidence of a causal link between the 2003 fall and her 2005 hip replacement to defeat summary judgment.

III. ARGUMENT WHY THE SUPREME COURT SHOULD AFFIRM

A. The Trial Court Record Was Sufficient to Enable the Court of Appeals to Tell that the *Burnet* Factors Were Satisfied.

The Blairs argue that, under *Burnet*, it is an abuse of discretion *per se* for a trial court to strike a plaintiff's trial witness without making three types of express written findings.

TravelCenters maintains that *Burnet's* findings requirement is not an end in itself, but is instead a means to an end, which is to make a record

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[5] The trial court initially stayed entry of an order dismissing the Blairs' case so they could seek discretionary review, CP 304-06, but they failed to do so in a timely fashion, and the court then entered the dismissal order, CP 307-09, from which the Blairs appealed.

[6] Dr. Colburn stated that he had seen Mrs. Blair for "independent medical evaluation[s]" of her ability to resume work. CP 338-340, 341-343.

in the trial court that enables an appellate court to satisfy itself that the trial judge struck a party's witness (a) because the party willfully violated discovery requirements or orders, (b) because the party's adversary would otherwise be prejudiced; and (c) after considering a lesser sanction. As the *Burnet* court explained:

> When the trial court "chooses one of the harsher remedies allowable under CR 37(b) . . . ***it must be apparent from the record*** that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial [Emphasis added].

Burnet, 131 Wn.2d at 494 (quoting *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989)).

No doubt, formal findings are often, or even usually, necessary in order for ***the record*** to make the three *Burnet* propositions ***apparent.*** In light of the record made in the trial court in this case, however, the Court of Appeals properly concluded that:

> Although the trial court did not enter findings on the record demonstrating its consideration of the *Burnet* factors, ***the record before us provides adequate grounds to evaluate the trial court's decision in imposing discovery sanctions.***

Blair, 150 Wn. App. at 909 (emphasis added).

It is evident that the trial court considered lesser sanctions not only because its October 15 Order, CP 277, states that the court considered the

Blairs' arguments opposing the motion (which included arguments based on *Burnet*, CP 205-08), but because the court had *already imposed* a lesser sanction by entering its *August 14* Order (CP 216-17) giving the Blairs a reprieve from their inadequately justified noncompliance with not one but both of two court-ordered witness disclosure deadlines. As the Court of Appeals put it, "[e]arlier in the discovery process when Blair's deficient disclosure was merely untimely, the trial court's sanctions did not exclude any particular witnesses, save one [a truck driver identified only as "Jim"[7]], and left Blair to make the determination [as to which witnesses she wanted to keep]." *Blair*, 150 Wn. App. at 910.

As *Scott v. Grader*, 105 Wn. App. 136, 141, 18 P.3d 1150 (2001), sensibly concluded, *Burnet* does not apply when an order excludes a witness as a sanction *for violating an earlier order* that *imposed a less severe sanction* for noncompliance with witness-disclosure deadlines. This case is like *Scott*, not like *Burnet*.

Because the Blairs did not show good cause for their noncompliance with court-ordered witness disclosure deadlines and requirements, and because they did not even attempt to justify their defiance, on October 2, of the trial court's August 15 and September 21 Orders, their violations were willful. *E.g.*, *Allied Fin. Servs. v. Mangum*,

[7] *See* CP 431 (No. 11) and CP 217 (interlineated language).

72 Wn. App. 164, 168, 864 P.2d 1 (1993). That is readily "apparent from the record" of this case, *Burnet*, 131 Wn.2d at 494, even without a formal finding saying so.

The Blairs argued below that their noncompliance with the Case Schedule Order's witness-disclosure deadlines had not been willful because their counsel had faced "complications and problems that contributed to the delay in full disclosure of witnesses." *Br. at 11.* But the clerk's papers to which the Blairs' brief cited, CP 128-130, were part of a declaration that their counsel filed on *August 9*, 2007 in opposition to TravelCenters' original motion to strike their entire late-served witness disclosure, on which the Blairs had listed no health care providers. The excuses offered in that August declaration did not purport to explain counsel's failure to ask the court for permission to list health care provider witnesses after August 9 and or at any other point prior to the September 4 discovery cutoff.

Similarly, findings were not necessary to make it apparent from the record of this case that it would have been prejudicial to TravelCenters' defense to let the Blairs call undeposed, out-of-county health care providers without even a summary of expected opinion testimony (and no indication that either person *has* any relevant opinions), and the Blairs

never offered such a summary or to make either person available for deposition prior to trial.

The Blairs claimed below that TravelCenters was not prejudiced by their having waited until October 2, 2007, to list Dr. Higgs and Mr. Drury as their medical trial witnesses even though the case scheduling order had required disclosure of possible witnesses in May and July 2007, CP 369, because TravelCenters had contended, in opposing the Blairs' June motion to continue the trial (CP 108-16), that there was "plenty of time" to complete discovery. *App. Br. at 5 and 11.* But defense counsel wrote that in early *July* 2007, CP 3, when there *would have been* plenty of time to complete discovery by the September 4 cutoff date had the Blairs identified Dr. Higgs and Mr. Drury (or a couple of other medically competent witnesses) as ones who might testify for the Blairs. The Blairs let the September 4, 2007 discovery deadline pass, however, without naming *any* possible health care providers as witnesses for them, and without ever asking the trial court to allow them to add to their witness list any particular health care providers or experts, or any finite number of such witnesses, in addition to the lay witnesses they did (belatedly) disclose.

The result of this case is consistent with *Johnson v. Horizon Fisheries, Inc.*, 148 Wn. App. 628, 201 P.3d 346 (2009), which, like this

case, involved a dismissal for violation of court case scheduling orders and a prior sanctions order for noncompliance. The *Johnson* court affirmed the dismissal of the plaintiff's case:

> CR 41(b) authorizes a trial court to dismiss an action for noncompliance with court orders. King County Local Rule 4(g) provides that "[f]ailure to comply with the Case Schedule may be grounds for the imposition of sanctions, including dismissal." While dismissal is disfavored, it is justified when a party's refusal to obey the trial court's order was willful or deliberate and substantially prejudiced the other party. Disregarding a trial court's order without reasonable excuse or justification is considered willful. The trial court must indicate on the record that it has considered sanctions less harsh than dismissal.

Johnson, 148 Wn. App. at 638-39. Rejecting the plaintiff's argument that the trial court should have considered a lesser sanction, the *Johnson* court noted that "***the trial court did more than merely consider using a stay as a less burdensome sanction. It imposed one*** [emphasis added]." The *Johnson* court concluded, 148 Wn. App. at 641, that "[a]lthough a CR 41(b)(1) dismissal [without prejudice] would have been less harsh, . . . [b]y the time the trial court dismissed the case, [the plaintiff] had demonstrated that he would not comply with the court's orders."

The same was true here. Indeed, the Blairs presented the trial court with a clear choice: it could either (1) strike Dr. Higgs and Mr. Drury, or (2) allow the Blairs to defy its September 21 Order and make a mockery of the local rules. But the King County local rules impose a case schedule

and witness disclosure deadlines in order to "have an orderly process by which a case can proceed[, and r]equiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion." *Lancaster v. Perry*, 127 Wn. App. 826, 833, 113 P.3d 1 (2005). It was the trial court's prerogative and responsibility to see that an orderly process was followed, not to indulge plaintiffs' chronic and unsatisfactorily explained inability first to meet either of two mandated witness-disclosure deadlines, and then to seek to add even a single health care provider or expert witness before the discovery completion deadline.

Like the Court of Appeals was, this Court is presented with a trial court record which, even without findings that say so, make it clear that the Blairs did not comply with the Case Schedule Order, were nonetheless given a sanction less severe than having all their late-disclosed witnesses stricken, were denied permission after the close of discovery to add more possible trial witnesses by Order to which they did not assign error but which they defied twenty days before the scheduled trial by adding undeposed health care provider witnesses to the list of people they intended to call at trial. The trial court did not abuse its discretion by striking Dr. Higgs and Mr. Drury, and the Court of Appeals correctly so held.

B. The Blairs Made No Offer of Proof with Respect to Dr. Higgs' and Mr. Drury's Expected Testimony.

Not only is the Blairs' *Burnet* argument unfounded, but they are unable to show that they were prejudiced by the Order striking Dr. Higgs and Mr. Drury, because they failed to make an offer of proof that either person could and would have expressed opinions to support the Blairs' causation allegations and their claims that their health care expenses had been reasonable in amount. *See Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections*, 122 Wn. App. 227, 245-247, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005) (offer of proof creates record for adequate review); *compare Aubin v. Barton*, 123 Wn. App. 592, 98 P.3d 126 (2004) (reversing exclusion of expert testimony because proponent had made detailed offer of proof demonstrating its admissibility). Dr. Higgs and Mr. Drury provided health care to Mrs. Blair, but that does not mean either or both of them had opinions about whether her 2003 fall had caused her to need the 2005 hip replacement.[8]

[8] A treating provider may have opinions that are admissible as the opinions of a "fact" (and non-expert) witness if the opinions were formed in connection with providing treatment (as opposed to having been formed for purposes of litigation), *see Peters v. Ballard*, 58 Wn. App. 921, 927, 795 P.2d 1158, *rev. denied*, 115 Wn.2d 1032 (1990), but the Blairs never made an offer of proof that either Dr. Higgs or Mr. Duruy has any formed-in-connection-with-treatment opinions as to causation issues. The Blairs also did not demonstrate or even represent that Mr. Duruy, an Idaho physical therapist, is willing to testify at trial and is qualified to express the medical causation opinions without which their case would fail, *i.e.*, that Mrs. Blair's 2003 fall caused her to need the hip surgery she had in 2005. *See Davies v. Holy Fam. Hosp.*, 144 Wn. App. 483, 500-01, 183 P.3d 283 (2008) (nurse not qualified to express admissible opinion as to cause of death).

C. The Blairs' "Reservation of Rights" Was Ineffective to Preserve a Right to Call Dr. Higgs or Mr. Drury as *Expert* Witnesses at Trial.

In their Petition for Review, the Blairs renewed an argument that, because they had purported in their August 17, 2007 second-chance disclosure to "reserve the right" to call any witness that TravelCenters had timely listed as a possible witness, and thus were entitled to name Dr. Higgs and Mr. Drury as trial witnesses (or any one or more of 33 other providers) on October 2 notwithstanding the court's August 15 and September 21 Orders and despite KCLR 26(b)(4). If the Blairs continue to pursue the argument, it is without merit for the reason stated in the Court of Appeals' decision:

> Former KCLR 26(b)(3)(A) and (B) expressly requires that the name, address, and phone number as well as relevant knowledge be provided for any possible lay witness. Further, the rule requires that a summary of opinions and the basis therefore be provided for any possible expert witness. TravelCenters listed Dr. Higgs and Drury as possible nonexpert witnesses. Blair would have her "reservation of rights" convert an adversary's nonexpert witness into an expert without complying with the rules.

Blair, 150 Wn. App. at 910-11. It is well established that one party may not call or present the testimony of an adversary's expert, even when that expert has been deposed during discovery, absent the adversary's consent to allow the use of such testimony. *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983); *Mothershead v. Adams*, 32 Wn. App. 325, 647 P.2d 525, *rev. denied*, 98 Wn.2d 1001 (1982). As the Court of Appeals

recognized in this case, no authority permits the conversion of an adversary's *non*-expert witness into one's own *expert* witness through such a "reservation of rights."[9]

D. Defense Counsel Did Not "Stop" the Depositions of Dr. Higgs and Mr. Drury.

The Blairs argued below, *App. Br. at 15*, that defense counsel "stopped" the depositions of Dr. Higgs and Mr. Drury from being taken by refusing to "cooperate" in setting their depositions. If the Blairs renew such an argument, this Court should reject it as an unfair characterization of what happened.

As TravelCenters explained in the Court of Appeals, *Resp. Br. at 28*, the "cooperation" that the Blairs' trial court counsel claimed he had sought from defense counsel in getting Dr. Higgs' deposition scheduled was sought in a letter of August 30, 2007. CP 321. The discovery cutoff date was September 4, CP 369, and Labor Day fell on September 3 in 2007. Dr. Higgs was not listed as a witness for the Blairs, and defense counsel had no reason or plan to call him at trial, so it is specious for the

[9] In the Court of Appeals, the Blairs asserted that *Rivers v. Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2001), "reveals that attorneys have reserved rights . . . to call witnesses." *Motion for Reconsid. at 7, n.2.* In *Rivers*, a litigant's lawyer had indeed "reserved the right" to call witnesses. The court did not hold, though, that the "reservation" had been effective; it mentioned it as an *example of noncompliance with* an order requiring a response to interrogatories asking for the identification of experts and the substance of their expected opinions – exactly what King County LR 26(b) required the Blairs to do, and what they failed to do. *Rivers*, 145 Wn.2d at 690-91.

Blairs to argue that defense counsel "stopped" an unscheduled deposition by not agreeing on August 30 either to have one (*if* Dr. Higgs was even available) during the two remaining business days before the discovery cutoff or by agreeing to extend the discovery cutoff to depose someone TravelCenters was not going to call and whom the Blairs had not listed and thus *could* not call at trial. *See* KCLR 26(b)(4).[10]

E. The Blairs' Trial Court Counsel Offered Excuses for the Blairs' Noncompliance with the May and July Disclosure Deadlines, But Not for Their Subsequent Order Violations.

The Court of Appeals' decision correctly holds that the Blairs did not provide the trial court with a valid reason for their failure to comply with the Case Schedule Order's discovery deadlines. *Blair*, 150 Wn. App. at 911. The Blairs' counsel did offer excuses, to be sure, but they concerned "turmoil" in their counsel's law practice in July-August, 2007, not excuses that would have permitted, much less required, the trial court to overlook the Blairs' noncompliance with its orders after the close of discovery in September and let them list Dr. Higgs and physical therapist Drury as witnesses twenty days before trial in October. Disorder in one's law office could explain and might excuse a missed deadline; it does not satisfactorily explain the Blairs' complete failure to meet both of the

[10] The record discloses no effort by the Blairs' counsel to obtain TravelCenters' counsel's "cooperation" in deposing Mr. Drury, the Idaho physical therapist, either for a discovery or perpetuation deposition.

court-ordered LR 26(b) witness-disclosure deadlines and their attempt to add undeposed new witnesses – whose opinions, even supposing they had any, were *even then* not disclosed – to their trial-witness list after the close of discovery.

F. The "Medical Record" Statement by Dr. Colburn, the IME Physician, Was Not Admissible to Defeat Summary Judgment.

The Blairs' Petition for Review made passing reference to, but did not present argument about, written IME doctor reports. *Pet. at 2 (last paragraph).* In case the Blairs' Supplemental Brief renews an argument they made in their motion for reconsideration below, TravelCenters addresses it.[11] Dr. Colburn, an Idaho IME physician, was someone the Blairs did not list as a possible or trial witness even on their October 2 trial witness list, CP 266-67, and he was not deposed. The Blairs did not represent that Dr. Colburn was willing to testify at a King County trial or was available for discovery and/or perpetuation deposition. The Blairs argued in the trial court that Dr. Colburn's "medical records" alone are admissible as substantive evidence under "ER 803," CP 292, and as "business records," CP 295. The Blairs did not specify which subprovision(s) of ER 803 they were referring to[12] and offered no

[11] TravelCenters' brief below addressed it as well at pages 29-37, and so did TravelCenters' answer to the Blairs' motion for reconsideration, at pages 1-5.

[12] The Blairs argued below that the statement in Dr. Colburn's IME evaluation report is admissible under ER 803(a)(4), but not until they filed their reply brief on appeal. *Reply*

foundational testimony with respect to Dr. Colburn's evaluation. The Blairs abandoned any "business records" argument on appeal.

As TravelCenters pointed out in its answer to the Blairs' motion for reconsideration in the Court of Appeals, the Blairs had also sought to avoid summary judgment in the trial court by citing an IME evaluation by another Idaho physician, Dr. J. Gerald McManus, whose report indicates that Idaho physicians, when commenting or opining for insurance/workers compensation purposes on the cause of a worker's injury, apply a "give-the-worker-the-benefit-of-the-doubt" standard of causation. CP 355. A medical causation opinion based on such a standard would either be inadmissible *per se* in a Washington trial, or would make the opinion admissible only if the physician testified personally at trial and was subject to questioning by defense counsel on voir dire or cross-examination.[13] The Blairs have never cited authority to the contrary or authority that such an opinion is inadmissible in written form, phrased as Dr. McManus's was. Because the Colburn statements were not admissible

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Br. at 17-19. See Westmark Dev. Corp. v. City of Burien, 140 Wn. App. 540, 553, 166 P.3d 813 (2007) (refusing to consider argument made for first time in reply brief, and citing decisions). The belated ER 803(a)(4) argument had not been made to the trial court, and thus should be deemed to have been waived for consideration on appeal. *Egerer v. CSR West, LLC*, 116 Wn. App. 645, 652, 67 P.3d 1128 (2003).

[13] *See Johnson v. Cassens Transp. Co.*, 814 N.E.2d 545, 550 (Ohio Ct. App. 2004) (the hearsay rule exception for statements made for purposes of medical diagnosis or treatment does not permit a court to admit a report containing the diagnosis or opinion of a physician other than the one testifying).

as substantive evidence for summary judgment purposes, and/or because they would have been inadmissible at trial without Dr. Colburn present to be examined by defense counsel and the Blairs never represented that he was willing to travel to Washington to testify for them, any arguments by the Blairs based on such written IME-examiner statements are not grounds for reversing the trial court's grant of summary judgment to TravelCenters.

IV. CONCLUSION

For the other reasons set forth above, the Supreme Court should affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 10th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 10th day of March, 2010, I caused a true and correct copy of the foregoing document, "SUPPLEMENTAL BRIEF OF RESPONDENT," to be delivered by e-mail and U.S. mail, postage prepaid, to the following counsel of record:

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DATED this 10th day of March, 2010, at Seattle, Washington.

Carrie A. Custer
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